

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States of America,
Plaintiff,

vs.

Case No. 10-10079-01-JTM

Erick Meza Garcia,
Defendant.

MEMORANDUM AND ORDER

This matter is before the court on the defendant Erick Meza Garcia's Notice of Appeal Out of Time (Dkt. 23), which the court treats as a motion for relief, as it asks for "permission to file this Notice of Appeal" and be heard as to his appellate claims. (*Id.*, at ¶ 9). Meza Garcia pled guilty on July 26, 2010 (Dkt. 15), and was sentenced on October 25, 2010. (Dkt. 20). The court entered Judgment, sentencing the defendant to a term of imprisonment of 60 months, the following day.

Under Fed.R.App.Pr. 4(b)(1)(A)(i), the defendant in a criminal case must file his Notice of Appeal within 14 days of the entry of judgment. Under Rule 4(b)(4), the court may extend this time if the defendant demonstrates "excusable neglect or good cause." However, this provision only authorizes an extension "for a period not to exceed 30 days from the expiration of the time otherwise provided by Rule 4(b)."

Rule 4(b) does not create a fundamental or jurisdictional bar to the court's ability to fashion relief, since the bar may be waived by the government. *See United States v. Mitchell*, 518 F.3d 740, 744 (10th Cir. 2008). But Rule 4(b), along with other court-created timing requirements, remain "inflexible claim-processing rules [which] must be enforced by this court when properly invoked by the government." *Id.* In the present case, the government has not waived the timeliness requirement but has affirmatively invoked it. (Dkt. 23, at 1-2).

Here, judgment was entered October 26, 2010. His Notice of Appeal was due November 9, 2010. The deadline for a motion to extend the filing of a Notice of Appeal was 30 days after this date, December 30, 2010.

Because the defendant's motion for permission to file a Notice of Appeal was filed nearly two years after this date, the court is unable to grant the relief sought. *See United States v. Phillips*, 2002 WL 1803851 (10th Cir. Aug.7, 2002) (district court was "undoubtedly correct" when it concluded that it could not extend the time for an appeal past the thirty days allowed in Rule 4(b)(4)).

IT IS ACCORDINGLY ORDERED this 6th day of December, 2012, that the defendant's motion for leave to file a Notice of Appeal (Dkt. 23) is hereby denied.

s/ J. Thomas Marten
J. Thomas Marten, Judge